Case No: 1600318 / 2022

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lakhveer Kaur**

Respondent: **Costco Wholesale UK Limited**

Heard at: **Cardiff** **On:** **20, 21, 23 and 24 February 2023**

Before: **Employment Judge Brace**
Non Legal Members **Mrs Y Neves and Mr A McClean**

Representation
Claimant: Mr M Paur (Counsel)
Respondent: Mr Gorasia (Counsel)

JUDGMENT having been sent to the parties on 27 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims

1. This is a claim brought by Mrs Lakhveer Kaur on 17 March 2022 in which she brought complaints of age, race, disability and religion or belief discrimination. Her ET1 was completed when she was a litigant in person and indeed she remained represented by her husband, a lay representative, until recently when solicitors were instructed.

2. In that claim, she complained of an on-going campaign of discrimination; that she had been bullied harassed, victimised and discriminated because of those protected characteristics. She complained that she had been constantly threatened about the security of her job and that she would be disciplined. She complained of being shouted at on the shop floor and that alleged issues regarding her work would be *'taken to the top'.*

3. She said she had been called to a number of disciplinary hearings for trivial and unfounded allegations, as well as a disciplinary for absence due to disability and that there appeared to be no good reason for them as she had done nothing wrong. She complained of no reasonable adjustments having been made.

4. She accepted that no sanctions had been issued but asserted that she believed that being called into the meetings was a form of bullying, harassment, victimisation and discrimination on the same four protected grounds.

5. She gave an example of unsubstantiated disciplinary action taken against her in November 2021 for allegedly arriving two minutes late, which she disputed and claimed that no one else had been called into a disciplinary and that no investigation was undertaken into the others who had signed in at the same time.

6. She further complained that a grievance raised was not investigated and that the Respondent had destroyed correspondence relating to the November 2021 disciplinary.

7. The Respondent filed its ET3 [14], generally denying all claims and seeking further particulars. In relation to the November 2021 investigation, the Respondent claimed that there was a fact-finding meeting and that the Claimant was one of several employees involved in the investigation, that the decision was taken that there was no case to answer against any of the employees including the Claimant and the matter did not progress beyond fact-finding.

List of Issues

8. A list of issues had been prepared at the case management hearing on 7 October 2022 before Judge G Cawthray and there was some further preliminary case management at the outset of the final hearing regarding whether the Claimant relied, not only on depression as an impairment, but also on whether the Claimant was relying on anxiety, stress and hyperthyroidism to support her claim that she was at the relevant times a disabled person.

9. After hearing submissions from both, permission was given to amend the list of issues to include the additional impairments. Reasons were given for that amendment during the hearing and subject to that amendment, the parties agreed that the List of Issues for determination by this Tribunal were as set out by Judge Cawthray on 7 October 2022 [34].

10. Whilst the Respondent had not conceded that the Claimant was disabled by reason of any of her conditions prior to the final hearing, during final

submissions at the end of the hearing, Counsel for the Respondent conceded that for the period until July 2020 the Claimant was disabled by reason of her hyperthyroidism. This followed discussion of the GP letter of 29 July 2022 [290] in which the GP had stated that:

a. the condition had resolved by July 2020;

b. the Claimant had stopped taking any medication for it; and

c. had suffered no complications or conditions resulting from that illness.

11. Counsel for the Claimant also confirmed that the Claimant does not claim that she was disabled by reason of her thyroid condition after July 2020, although they claim that the Claimant was disabled by reason of depression from 2016.

12. The Respondent continues to dispute that the Claimant was disabled by reason of depression, anxiety or stress and continued to dispute knowledge in any event.

The Evidence

13. The Tribunal heard evidence over the course of three days from the Claimant, and for the Respondent:

a. Kim Thomas, Clothing Supervisor, Cardiff Warehouse, (from October 2017);
b. Kelly Miller, Merchandising Manager, Cardiff Warehouse (from January 2021);
c. James McGlone, General Manager Cardiff Warehouse from x until January 2022;
d. Sue Knowles, Marketing and HR Director based in Watford, having executive responsibility for management of HR at the Respondent; and
e. Jan Semple, Regional Operations Director for the Respondent, also based in Watford.

14. All witnesses relied upon witness statements, which were taken as read, and they were all subject to cross-examination, the Tribunal's questions and re-examination.

15. The Tribunal was referred selectively to the hearing bundle of relevant documentary evidence ("Bundle").

Assessment of the evidence

16. The Tribunal was satisfied that all witnesses gave their evidence honestly and to the best of their knowledge and belief. It is not necessary to reject a witness's evidence, in whole or in part, by regarding the witnesses as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. It assesses a range of matters including:

    a. whether the evidence is probable,
    b. whether it is corroborated by other evidence from witnesses or contemporaneous records of documents,
    c. how reliable is witness' recall; and
    d. motive.

Facts

17. The Respondent is a cash and carry warehouse membership club operating through 29 warehouses nationwide in the UK and employs around 8,000 employees in total.

18. The Claimant is a Sikh woman of Indian ethnic origin and was 52 years old when she presented this claim.

19. She commenced employment with the Respondent on 28 May 2010, as a Service Assistant or 'Stocker', at the Respondent's Cardiff warehouse and allocated to the clothing department within the Merchandising department. Her duties included setting out and tidying of stock and assisting customers with any queries.

20. The Claimant reported to a Clothing Supervisor and a Centres Supervisor who, in turn reported to the Merchandising Manager. The Merchandising Manager supported Assistant General Managers and the General Manager of the warehouse.

21. The Cardiff warehouse is a large workplace operating on one floor covering multiple departments and the size of several football fields. There is however an upstairs which contained a breakroom for staff.

22. The Respondent operated an automated timecard system ("ATS") for staff to clock in and out. One was located in the upstairs break room and one located at the front entrance of the warehouse.

23. Staff who arrived for work before 10am did so via the back entrance to the warehouse and would need to walk across the warehouse floor to the ATS. The ATS is a digital system, utilising a barcode that is scanned by staff containing their individual personal data when starting or finishing shifts. Above the ATS scanner was a clock and the Respondent's policy was that staff should not clock in more than 3 minutes before their shift commenced. Some 3 minutes grace after the shift commenced was also given to allow staff to walk through the warehouse to the ATS scanner and to get to their respective departments.

24. In July 2019, the Claimant had also received a 2019 'CostCo Employee Agreement ('Employee Agreement')' [81], a document that included noncontractual procedures and policies applicable to the Claimant's employment including:

    a. An informal 'Open Door Policy' for informally resolving issues at the workplace level with the Manager/Supervisor (clause 2.1) [81];

    b. A three stage Formal Grievance Procedure (Clause 2.2) [82], which provided that if the informal Open Door Policy had not resolved matters, or if it was felt inappropriate, employees should raise matters in writing to their immediate line manager (or if the complaint was about their manager, his/her immediate manager); and

    c. A Disciplinary Policy and Procedure (Clause 11.1) [85].

25. The Disciplinary Policy and Procedure provided that no disciplinary action would be taken until the matter had been investigated and that, as part of that investigation, the employee may be invited to an investigation meeting for the purposes of fact-finding; that if it was decided that there were grounds for disciplinary action, the employee would be informed in writing of the allegations and they would have an opportunity to state their case at a disciplinary meeting to discuss those allegations [85]. One of the underlying principles of the policy was that if employees had any difficulty at any stage of the procedure because of a disability, they should discuss the situation with their line manager or HR as soon as possible [86].

26. The Disciplinary Procedure provided for:

    a. an initial oral warning if conduct or performance was unsatisfactory, which would remain in force for such period as was considered appropriate; and

    b. Employee Counselling Notices to be given in writing if a disciplinary offence was committed, when an employee would be asked to sign receipt of it, or if there was further misconduct or poor performance following oral warning. These would remain in force generally for six months [86].

27. The Disciplinary Policy and Procedure also set out the Respondent's guidelines on causes for disciplinary action which included its policy on:

    a. 11.3 1) - violations of paid sick/personal time and defined 'excessive absenteeism' as exceeding two instances in any 12 month period and provided that third and fourth instances of absence in any 12 month period may result in a Counselling Notice [95]. It further provided that if the employee, or a member of their family had a disability which resulted in the employee incurring more instances of absenteeism, an exception *may* be made such that any absence due to such disability would not count as an occasion of absenteeism *provided* medical substantiation was produced; and

b. 11.3 4) - excessive lateness including, in a 30 day period, three separate occasions of 4 minutes or more; or two separate occasions of 30 minutes or more [93] and

28. It also set out its policy on Gross Misconduct or Dismissal for Cause and included a non-exhaustive list of the types of potential grounds for such termination which included the following:

    1) Falsification of Company records and/or swipe card entries, including omitting facts or wilfully giving wrong or misleading information. Such a ground included, but was not limited to '*having your time card signed, or name card swiped by someone else'.*

29. The Claimant was familiar with such policies. She both and knew how to raise a grievance, having confirmed as much on cross examination and having raised a grievance previously in 2016 to her then manager, Nicky Jones, against her then team leader complaining of race, and subsequently age discrimination [320-328]. She was aware that if she was struggling as an employee she could raise an issue with her manager or HR accepted that she had been encouraged at the end of that grievance to raise harassment as soon as possible after it had occurred.

30. The Claimant was also aware that employees could be subject to Counselling Notices as part of the Respondent's conduct and capability management process, but had understood that these Counselling Notices generally remained in force for 12 months, not the 6 months stated in the policy. She was also aware that the Respondent treated falsification of ATS very seriously and understood that falsification of company records and/or swipe card entries included clocking offences.

31. Timekeeping and absence of employees was not managed by departmental supervisors, but was automatically picked up by payroll through the ATS which in turn triggered notifications to management when lates and/or absence levels reached the trigger points set out in the Employee Agreement when letters inviting staff to a 'disciplinary meeting' would be sent. These letters would be triggered and sent even if the employee had a known disability when issues could be discussed at the disciplinary meeting.

32. To complete the picture, the Respondent also had in place a Privacy Statement [101], which explained how the Respondent handled its employees' personal data, including details of any disciplinary and grievance warnings and related correspondence, and which provided that data would be kept in accordance with the Respondent's Document and Data Retention Policy [107]. That Document and Retention Policy provided for retention periods of 7 years after the termination of employment subject to 'litigation hold' [109] i.e. potential evidence that may be required in the course of litigation.

Claimant's health and management 2018-2020

33. On joining the Respondent's employment, the Claimant completed an emergency contact information sheet in which she indicated that she had no health problems and no medication was being taken [117], but in June and July 2016, the Claimant attended her GP practice and was diagnosed with endogenous depression and prescribed some antidepressants during those months [297]. There is no evidence in the GP records that this episode continued beyond that two-month period or that the Claimant continued with the anti-depressants at that time.

34. On 18 October 2017, the Claimant was absent from work for two weeks as a result of an 'Acute Stress Reaction' as reflected by her Fit Note [125] but no evidence was given by the Claimant regarding that period or reason for her stress reaction and this appears an isolated episode.

35. In late 2017, Kim Thomas became the Claimant's Supervisor reporting to Nicky Jones, Merchandising Manager with Mark Dowling as the Warehouse Manager.

36. The Claimant was also diagnosed in December that year with an overactive thyroid, and by March 2018, the Claimant's GP had written to the Respondent confirming that the Claimant suffered from that condition with symptoms of lethargy and anxiety. The Respondent was asked if this could be '*born in mind when assessing her duties at work' [150]*. This over-active thyroid condition continued until July 2020 [290].

37. The following week, the Claimant wrote to Mark Dowling, complaining that her rota had been changed, that she had told her line managers that she had recently been diagnosed with a thyroid disorder and that one of the symptoms was tiredness and fatigue which needed to be controlled by rest and routine. She asked for her shift to revert to a 5am start (6am on Sundays) [151].

38. It appears more likely than not that as a result of this, together with receipt of a subsequent Fit Note dated 19 April 2018 recording hyperthyroidism and indicting that the Claimant would benefit from working early shifts only in the period April through to May as evening work was exhausting [152], Mark Dowling wrote to the Claimant on 24 April 2018 asking that if the shifts were making her unwell then she should revisit her GP and they could discuss further.

39. We have had no evidence from any of the witnesses, including the Claimant as to what, if anything, further arose at that point save that the Claimant remained on her 5am start shift.

40. The Claimant's employment was subject to annual performance reviews and appears to have continued from the commencement in 2010 without any formal management necessary of the Claimant's performance, timekeeping or sickness or certainly none that have been brought to this Tribunal's attention. Indeed, the Claimant has accepted that at no time

during her employment has she been issued with any Counselling Notices.

41. On 18 June 2018, the Claimant had her first performance review conducted by Kim Thomas [154] and that review recorded the following, that:

    a. the Claimant had been '*late for her shift 9 times this year; this is unacceptable and needs considerable improvement*';

    b. wasn't flexible in her shifts due to having a second job; and that

    c. there were some concerns regarding the Claimant's performance that required improvement.

42. Later that month, on 28 June 2018, it appears that the Claimant was invited to a formal disciplinary hearing to discuss her lateness that month and informed that if this was proven, then she would be issued with a Counselling Notice [157]. Whilst the letter appears to come from Kim Thomas, she gave evidence, which we accepted, that payroll triggered such a standard letter.

43. We accepted that evidence and found more generally that such invite letters would be automatically triggered by payroll. What arose at or following that meeting was not in evidence before us save that no Counselling Notice was issued and it appears that the Claimant was absent from work for two days the following month in July 2018 citing 'thyroid trouble' on 22-24 July 2018 [158].

44. Whilst Kim Thomas has accepted that she was aware that the Claimant had a thyroid problem, she denied that she was aware of this as a result of the Claimant's medical records on the Respondent's personnel file. The Respondent operated a system whereby such medical evidence would go straight to more senior management and would be placed on the Claimant's personnel file that would not be accessed by supervisors and that it would not be referred to within performance reviews unless the employee have consent.

45. She also gave evidence that the Claimant herself had informed her of the thyroid condition, although she was unable to recall the exact date, and that had as part of general management of the Claimant she was aware that the Claimant sometimes struggled with fatigue and getting to work on time and that as a result, she would ask the Claimant whether she wished to change her shifts or assist the Claimant with her workload if requested. We accepted that evidence.

46. In terms of Respondent absence records, the Claimant had self-certified when off sick for 5 days in October 2018 citing 'depression' [159] and later that month self-certified with 'Stress at work' for the period 20 October 2018 to 14 November 2018 [163] and presented a Fit work for the period 26 October 2018 – 9 November 2018 [160].

47. This appears to coincide with a letter of 13 November 2018 that Mark Dowling wrote to the Claimant, confirming that it had been brought to his attention that the Claimant had been off work with 'work related stress' and that he had also been told by her line managers that they needed to have a discussion with her regarding work performance. He stated that

    he would be asking them to have a full and frank discussion about her performance when she was fully fit for work and that included revisiting comments made and discussed at the last appraisal. She was provided with details of the employee support programme and she was informed that if after her return to work and discussions with her line manager she should feel free to discuss any concerns with him. There is no evidence from the Claimant that she did [162].

48. A further Fit Note was provided by the Claimant for the period 19 December 2018 to 1 January 2019 stating 'stress-related problem' [164] which was supported by a return to work interview in which the Claimant reported that she had been suffering from anxiety – stress [165].

49. Whilst there appears to be a 'gap' in the Claimant's GP notes from 24 November 2017 [297] to 20 October 2019 [296], an extract from the Claimant's GP records relating to the Claimant's medication indicates that the Claimant had again been prescribed a course of antidepressants again around this time [300], but there are no GP records indicating that the Claimant made contact with her GP practice again regarding depression until November 2021 [291].

50. On that basis, we accepted that by around the summer of 2018, Kim Thomas was aware that the Claimant had hyperthyroidism, as did the Respondent more generally as a result of the correspondence with Mark Dowling. We also found that both Kim Thomas, and the Respondent more generally, had knowledge that fatigue and anxiety were symptoms of such a condition and that the GP was recommending adjustments for that condition as a result of the GP letter and the discussions that the Claimant was having with Kim Thomas.

51. Whilst the Claimant asserts that she told Kim Thomas that she had depression around April or May 2021, Kim Thomas denies this. Indeed she denied that the Claimant had ever told her that she had depression, anxiety or stress-related symptoms. We preferred the evidence of Kim Thomas in that regard and found that Kim Thomas did not have knowledge at any time of depression or anxiety, stress-induced or otherwise.

52. The Claimant had a performance review in August 2019 in which the Claimant noted that she had to improve her sickness (8 days that year) but highlighted that this had been a difficult period due to her overactive thyroid which she stated caused muscle weakness and anxiety [169]. No reference is made to any depression or anxiety or stress induced condition.

Disciplinary One - 27 Jan 2020 CWS para 11 [172] and [173]

53. On 27 Jan 2020, the Claimant was invited to attend a disciplinary meeting regarding absences dating back to February 2019 [172].

54. No clear evidence is before us as to why the Claimant had been absent from work on 1 January 2019 or indeed 22 March 2019, the first two dates of absence recorded in that invite letter.

55. Indeed, the Claimant's representative was unable to explain why the Claimant was absent on those first two dates and on cross-examination stated that they did not know the reasons for the Claimant's absences save that the last absence of the three, on 6 January 2020, the Claimant had been off sick with a viral infection [170/171], which the Claimant accepted had nothing to do with any disability. Whilst there was some suggestion that one of the absence was due to a family emergency, the Tribunal found no evidence to make a finding that this had more likely than not been the case.

56. It appears that the Claimant attended that meeting with her son, a meeting which was conducted by Nicky Jones. Notes of a meeting were contained in the Bundle [173] in which it is reflected that the absences were due to 'health reasons'.

57. The Claimant accepted in cross-examination that Nicky Jones was trying to ascertain the reason for her absence and whilst what, if any, further steps management took subsequently is not in evidence before us, the Claimant accepted that no disciplinary sanction, whether a Counselling Notice or otherwise was given to her (§12 CWS). Although the Claimant accepted that the allegations against her did fall within the Respondent's disciplinary policy, she complained that she should not have been invited to the meeting as an informal discussion could and should have taken place.

Performance Review 2020

58. Whilst the exact date is uncertain, the Claimant's medical issues appear to have been raised again at the 2020 performance review, conducted by Nicky Jones, in response to concerns regarding the Claimant's pace of work [176-178]. The Claimant commented on her review documentation that she enjoyed her job very much. *Disciplinary two – October November 2020*

59. The Claimant asserts that in October/November 2020 she was invited to an unfounded disciplinary regarding lateness which did not result in a finding against her. She claims she had been told she had been late more than three times in a month and that at that meeting she had explained that she had been suffering from depression and that she was struggling and that as a result the disciplinary manager, Nicky Jones stopped the disciplinary.

60. We found that the Claimant had not proven that such a disciplinary meeting had taken place at all as:

    a. Unlike the first disciplinary relied on, the Claimant had not disclosed or provided a copy of any invite letter or indeed any documentation relating to the disciplinary relied on. The Respondent had not as they had denied that such a disciplinary had taken place;

    b. Our attention was drawn to the attendance records for the period May 2019 – April 2021 [279-283] which reflected that the Claimant had not in fact been late more than three times in any 30 days during that extended period.

61. Indeed there is no documentary evidence supporting the claim and we found that if such a discussion had taken place, that this would have been at most an informal conversation. *Disciplinary Three – October / November 2020*

62. The Claimant claims that approximately two weeks after that second disciplinary meeting she was again invited to a further disciplinary meeting for not completing her work tasks correctly as she had forgotten to put out clothing and that she was given an oral warning by Nicky Jones.

63. The Claimant has not disclosed any documented invite and Kim Thomas denied escalating any such performance concerns to a disciplinary level.

64. Again, we do not consider it likely that such a formal disciplinary meeting had been organised. Again, we concluded that the Claimant had not proven that such a disciplinary meeting had taken place. *Treatment in 2021*

65. The Claimant has alleged that she was threatened with discipline and loss of job, shouted at and told that there were performance issues that would be managed (List of Issues §3.1). Within the witness statements there were specific allegations that:

    a. around February / March 2021, Kim Thomas had spoken to Nicky Jones within the Claimant's earshot telling him that the Claimant was the 'slowest worker';

    b. around April/May 2021, the Claimant had told Kim Thomas that she had a problem with her thyroid gland feeling tired and run down [28] and that in response Kim Thomas has said if she was looking for a reduced workload *'it was not going to happen';*

66. Whilst Kim Thomas admitted that routine conversations about instructions or tasks to be completed were given, these specific allegations were denied by Kim Thomas. We accepted that evidence which we considered to be more credible than the Claimant's on the issue taking into account:

a. That in June 2021, the Claimant had her 2021 performance review [180/181] where performance concerns were raised and whilst the Claimant noted on the form that she disagreed with some of the performance concerns, she indicated that she enjoyed her job very much and no concern was raised by her;

b. On cross-examination, the Claimant was questioned why she had not in the 2021 performance review complained about being targeted or discriminated, despite complaining that work had been incomplete due to insufficient staff. She responded that she didn't know that she could complain and that she was afraid of losing her job. We did not accept that as the Claimant had not been afraid of disagreeing with her review, and had complained in the past;

c. We concluded that if the Claimant genuinely had concerns at that stage she would have raised them. She did not. Indeed she did not raise them at any stage and whilst we accepted that the Claimant did refer in general terms to previous issues in her grievance, she did not raise such matters until after the issue of these proceedings; and finally,

d. The change in the Claimant's position in relation to the April/May conversation with Kim Thomas, from her Further Particulars in which she stated that the conversation related to a thyroid issue (which had ceased by July 2020) to depression, in her written witness statement[1].

67. The Claimant further alleged that in July / August 2021, Kim Thomas had told her that she needed to work faster and that she '*needed to pull [her] finger out'* and again in around October 2021, Kim Thomas threatened to *'take her to a disciplinary'*, that she took up more of her time than anyone else and was becoming a burden.

68. Again, this is denied by Kim Thomas and we preferred her evidence, which was clear that she did not threaten the Claimant with discipline, whilst at the same time not resiling from the fact that some performance coaching conversations had taken place with the Claimant regarding her performance.

69. The Claimant also relies on events such as Kim Thomas refusing her leave when her aunt passed away, discussions regarding Saturday rosters and being allowed time off to have a flu jab. Kim Thomas dealt with these issues on cross-examination denying that she had dealt with the family leave request indicating that this had been passed to Nick Jones to deal with, accepting that she did have a conversation after the Claimant had complained that she had been rostered to work more Saturdays and accepting that this had arisen due to holiday leave of others.

[1] Claimant Witness Statement §20

70. We considered that these events were nothing more than run of the mill management and, taking into account that Ms Thomas was on adoption leave between 26 September 2021 – 25 October 2021, we did find that any such conversations could or would not have taken place in the timeframes that the Claimant had indicated in any event.

71. Likewise, whilst both Kim Thomas and Kelly Morris did recall having a conversation with the Claimant regarding leave of absence for a flu vaccination, we preferred the Respondent's consistent evidence of the interaction that day and considered such interaction to be no more than reasonable management conversations taking into account that the Claimant did not raise these specifically as part of her grievance or appeal.

Disciplinary 4 – November 2021

72. On 11 November 2021, the Respondent's ATS digital clocking or scanner system was not operating and staff that morning were required to manuscript record their Starting Time on the ATS Employee Time Card Exceptions Log ("Exceptions Log") which was placed under digital scanner [184/331].

73. The Claimant gave evidence that she came into work at 'normal time' and on the Exceptions Log she recorded a start time of 5.00am. Kim Thomas later that day spoke to Kelly Miller telling her that she had noted that the Claimant had arrived on the department late that day.

74. Kelly Miller has given evidence, which was not challenged and was accepted, that in the period of time leading up to the disciplinary investigation, management had already noticed that there were a number of employees arriving 5-10 minutes late to their departments after their scheduled start times but who had swiped their card on time. As a result staff, including the Claimant, had been told that improvements were expected.

75. She therefore determined to undertake an initial fact-find and personally cross-checked the ATS sheet with the CCTV recording in the management offices.

76. Whilst Kelly Miller does not indicate in her written statement that she did so in conjunction with Ross Harrington, Assistant General Manager, this evidence did arise in cross-examination. That it only arose during that questioning was not a significant factor for us and did not lead us to conclude that Kelly Millar had lied, which has been suggested by the Claimant or that there was no evidence that the Claimant was seen arriving after 5am.

77. We accepted Kelly Miller's evidence that on this initial fact-find, on viewing the CCTV she took a mental note that all staff save for the Claimant had arrived prior to 5.00am and that the Claimant had not arrived at the

warehouse at that time, but after 5.00am. No copy of the CCTV was retained or 'burned' as a copy by her at that point, or indeed any later time. No written record of what she had seen was made at that or indeed any time by her.

78. We did not find this concerning as in reality the investigation did not result in a disciplinary hearing. We accepted that had it resulted in a hearing, a copy of the CCTV would not have been burned and given to the Claimant in advance (whether at the investigation or hearing) in any event, due to the Respondent's concerns regarding GDPR but rather the CCTV would have been played to and viewed by the Claimant at any disciplinary hearing.

79. Kelly Miller asked Kim Thomas to invite the Claimant to an investigatory meeting to discuss the discrepancy. This invite was prepared by Kim Thomas and Craig Dyer, the Centres Manager, and dated 13 December 2021 [185] based on the information given to them by Kelly Miller.

80. The letter stated that at a meeting on 16 December 2021, the Claimant was to answer an allegation of falsification of company records and/or swipe card entries. It was specifically alleged that on 11 November 2021, the Claimant had signed and recorded an ATS start of 5.00am but that she had not entered the building until 5.02am and was not on her department until 5.06am. The letter did not state the time the Respondent should have clocked in but nor did we expect it to – rather we considered that this was a matter that could and likely would have been addressed at the disciplinary investigation or later hearing if it had been held.

81. There has also been an issue during this hearing, as to why the ATS Exception log/sheet had been amended, amending the Claimant's start time for payroll purposes from 5.00am (as written by the Claimant) to 5.06am. Whilst we accept that there was a lack of explanation as to why the redacted and unredacted ATS sheets differed, we considered that this was because none of the witnesses during this Tribunal knew and we made no positive findings of fact on the change.

82. That investigation meeting was conducted by Craig Dyer and whilst he has not attended to give evidence, there was in the Bundle a note of the meeting, which was unchallenged and which we accepted was an accurate reflection of matters discussed [186]. The note reflects that the Claimant explained that she came in at 5.00am and by the time she had walked to the ATS at the front of the warehouse, she discovered that it was not working; that as there was a queue to sign the Exception Log by that ATS, she went upstairs to clock in, which was also not working. She had returned downstairs and signed at that point, putting in 5.00am as the starting time. She confirmed that she did not check the time and had not checked her phone for the time.

83. There is also a dispute between the parties as to whether, in the days following the disciplinary investigation meeting, Kim Tomas and Kelly Morris made remarks to the Claimant as set out in her witness statement.

All comments were denied by both the Respondent witnesses and again we preferred the evidence of the Respondent for the same reasons as previously provided and found that the Claimant had not proven that the comments had been made.

84. The Claimant was then invited to a disciplinary hearing and within the Bundle, two invite letters were provided:

    a. one dated 27 November 2021 inviting her to a meeting on 29 December 2021 [188]; and

    b. one dated 29 November 2021 inviting her to a meeting dated 2 December 2021 [189].

85. No explanation has been provided by anyone, whether the Claimant or Respondent's witnesses, as to why two letters were prepared but both were in the Claimant's possession.

Meeting with James McGlone

86. Either way, despite the Claimant asserting in her ET1 claim form, that she attended that disciplinary hearing, it appears to be common ground that no disciplinary hearing did take place as, on 2 December 2021, the Claimant submitted a formal grievance to Dominic Flanagan, UK Training Manager complaining about discriminatory treatment she felt she had been subjected to and that '*A recent example of this discriminatory treatment is the unsubstantiated disciplinary action that is being undertaken against me. The disciplinary relates to me allegedly arriving to work two minutes late*' [190].

87. In that grievance, she explained in some detail her version of events of that morning and ended by saying that this was not the first time she had been subjected to unfounded and unfair disciplinary action. She wanted the recent disciplinary action stopped until her grievance was investigated.

88. James McGlone, the Warehouse General Manager, was provided with a copy of the Claimant's grievance and advised by Dominic Flanagan that the Claimant's concerns could be dealt with as part of the disciplinary process.

89. Before that was actioned however, on the following day the Claimant sought out James McGlone and asked to speak to him.

90. The Claimant gave little evidence about this meeting, simply stating that she had attended a meeting to discuss her concerns and that any decision that the disciplinary allegations were suspended indefinitely were never confirmed to her.

91. Mr McGlone gave more detailed evidence however, which we accepted, that at that meeting:

    a. he listened to her account of what had happened on 11 November;

b. listened to her concern that she had felt singled out and that there had been previous instances where she had been singled out unfairly; and

c. reviewed with her the ATS sheet that had been over-written by the administration team for payroll purposes.

92. He also told us that he listened to her explanation that the time she had written may not have been correct and concluded that a disciplinary sanction was not likely outcome or something he could support if it came to appeal. He felt that matters should have been 'nipped in the bud' after the initial fact-find by Kelly Miller and investigation by Craig Dyer.

93. Whilst the Claimant denies that James McGlone confirmed to her that the allegations would be suspended indefinitely, he gave evidence that he told the Claimant that any disciplinary would be stopped straight away and that nothing would be retained on her file. He also told that that she should tell him immediately if anything further arose that caused her concern.

94. We accepted James McGlone's evidence and found that the Claimant had been told as much.

95. The Claimant had thanked him at the end of the meeting and he considered the matter closed at that point. We also found that he did not discuss the Claimant's wider discrimination grievance however as his focus in that discussion was the current disciplinary.

96. On cross-examination James McGlone's accepted that in hindsight he should have let the disciplinary run its course and should have confirmed the outcome of his meeting with the Claimant in writing. He did not.

97. After the meeting he spoke to the disciplinary officer, Gary May, and Kelly Miller and confirmed that no further action would be taken.

98. Either at that meeting or shortly after, he removed all and any paperwork relating to the ATS disciplinary from the file which was then destroyed.

99. We also found that it was more likely than not that no steps were taken to preserve the CCTV of 11 November 2021 at that point as management considered the matter concluded and the footage of that day was automatically taped over in the normal CCTV recording cycle of a few weeks.

100. Later that day he spoke to the Claimant's husband in a telephone call who asked if there were any documents or Whatsapp messages about the Claimant. James McGlone confirmed to him that no documentation had been retained regarding the disciplinary and so none to provide.

101. James McGlone later had an email from the Claimant thanking him for their earlier conversation. In that email she also made a subject

access request for all documentation where she was referenced [193]. This was not actioned by him as he believed that he had already addressed this in his conversation with the Claimant's husband. He did not pass on the request to the Respondent's GDPR team as a result of that misunderstanding. This was eventually passed to the Respondent's GDPR team and was dealt with after some further delay, a delay partly occasioned by the Claimant's father unfortunately passing away

102. On 10 December 2021 the Claimant presented a Fit Note (Stress at Work) and did not return to the workplace again [195]. James McGlone had no further conversations with the Claimant. *Grievance: Outcome and Appeal*

103. On 24 January 2022, the Claimant contacted ACAS and on 1 February 2022, Sue Knowles was contacted by them regarding her allegations of discrimination. By that time James McGlone had moved to Reykjavik and was no longer the General Manager of Cardiff. She spoke to him and took some preliminary steps to ascertain what, if any, disciplinary action had been taken against the Claimant. No one could recall any disciplinary action being taken against the Claimant or recall any discussions over and above what they considered to be routine performance coaching of a member of staff.

104. Sue Knowles suggested to ACAS that she have a meeting with the Claimant, which was agreed to. and took place by telephone on 1 March

2022 with the Claimant's husband speaking on behalf of the Claimant. It was agreed, following a request from the Claimant's husband, that the grievance be dealt with under the Formal Grievance Procedure and that Sue Knowles provide a formal written response. No details of the unfounded or unfair disciplinary action or examples of why she believed she was discriminated against, were provided by the Claimant.

105. On 6 March 2022, early conciliation ended and ACAS issued its early conciliation certificate [1] and on 17 March 2022 the Claimant issued this ET1 Claim.

106. In the interim, Sue Knowles, subsequently:

a. Reviewed the Claimant's personnel file, including her performance reviews and attendance diary, and noted that there were no notes on file regarding disciplinaries;

b. Spoke to James McGlone, who confirmed that he had destroyed the paperwork from the ATS investigation to reassure the Claimant that the matter was closed; and

c. Asked for statements to be taken from managers covering merchandising. These were provided by each of the managers without reference or knowledge of the discrete complaints that were being made by the Claimant.

107. On or around 21 March 2022 Sue Knowles realised that the Claimant had submitted a GDPR subject access request, that James McGlone had erred in believing that he had already dealt with such a request and put steps in place to ensure that this would be responded to.

108. On 21 March 2022 she wrote to the Claimant with her findings [216] which included a right of appeal concluding that she could find no evidence of discriminatory or unreasonable treatment. That letter is incorporated by reference letter into these written reasons.

109. On 11 April 2022 the Claimant appealed that decision, which was dealt with by Jan Semple and a meeting was held on 13 June 2002. Jan Semple sent her appeal decision on 24 June 2022.

The Law

Disability – s.6 Equality Act 2010

110. The Equality Act 201 ("EqA") provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'.

111. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:

a. Does the person have a physical or mental impairment?

b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?

c. Is that effect substantial?

d. Is that effect long term?

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112. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (**Goodwin** *v* **Patent Office** [1999] IRLR (EAT)*).*

113. In **Goodwin** Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach with regard to the determination of the issue of disability. At paragraph 22 he said:

"*The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed*

intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question." 114. The EqA 2010 Guidance states;

> '*In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household takes, walking and travelling by various forms of transport, and taking part in social activities'* (D3).

115. The EqA 2010 Guidance (D3) indicates that normal day-to-day activities can include 'general work and furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations in itself, tribunals must take account of it where they consider it to be relevant.

116. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (s.212 EqA and B2 Guidance).

117. Para 5 Sch. 1 Part 1 EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect.

118. In this context, likely is interpreted as meaning 'could well happen'. The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance).

119. The question of whether the effect is long term is defined in Sch. 1 Part 2 as lasting 12 months; likely to last 12 months or likely to last the rest of the person's life. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood.

120. Finally, the burden of proof is on the claimant to show she or she satisfied this definition. The time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (**Cruickshank** v **VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect.

s.26 EqA 2010 - Harassment

121. Section 26 of the Equality Act defines harassment under the Act as follows:

(1) A person (A) harasses another (B) if –

a. A engages in unwanted conduct related to a relevant protected characteristic, and

b. the conduct has the purpose or effect of –

i. violating B's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

a. the perception of B;

b. the circumstances of the case;

c. whether it is reasonable for the conduct to have that effect.

122. In **Richmond Pharmacology** v **Dhaliwal** [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:

a. was there unwanted conduct;

b. did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and

c. was it related to a protected characteristic.

123. It was also said that the Tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The Tribunal must also take into account all the other circumstances.

s.13 EqA 2010 Direct Discrimination

124. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

(1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

125. The provisions are designed to combat discrimination and it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council v Zafar** [1998] ICR 12 and the concept of treating someone "less favourably" inherently

requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "*there must be no material difference between the circumstances related to each case*."

126. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the tribunal should consider how the Claimant would have been treated if they had not had the protected characteristic. This is often referred to as the hypothetical comparator. Exact comparators within s.23 EqA 2010 are rare and it may be appropriate to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator (see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196. The courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and the importance of drawing inferences : **King v The Great Britain-China Centre** [1992] ICR 516.

127. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed** [2009] IRLR 884 and the authorities discussed at paragraphs 31- 37.

128. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; **Bahl v Law Society 2004 IRLR 799.**

<u>S.20 Duty to make reasonable adjustments</u>

129. Section 20 EqA states that: …

(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

Section 21 EqA states that:

(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments; and
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

130. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a

reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The examples previously given in section 18B(2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.

131. The duty to make adjustments comprises three discrete requirements, any one of which will trigger and obligation on the employer to make any adjustment that would be reasonable and a failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person.

132. In **Environment Agency** v **Rowan** [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:

a. the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant'.

133. PCP is not defined within the EA 2010. EHRC Code of Practice (6.10) states that the phrase should be construed widely and could include informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.

134. In **Cumbria Probation Board v Collingwood** [2008] All ER (D) 04 (Sep), EAT, HHJ McMullen said that *"it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage*".

135. Finally, the duty to make adjustment arises by operation of law. It is not essential for the claimant himself to identify what should have been done (**Cosgrove** v **Ceasar and Howie** [2001] IRLR 653, EAT). Indeed, the EAT held in **Southampton City College** v **Randall** [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

136. S.212 (1) EqA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis (EHRC CoP, 6.15). It is necessary for a Tribunal to identify the nature and extent of any alleged disadvantage suffered and to determine whether that disadvantage is because of disability.

137. In order to do so, the Tribunal should consider whether the employee was substantially disadvantaged in comparison with a nondisabled comparator. If a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage (**Newcastle Upon Tyne Hospitals NHS Trust** v **Bagley** (2012) UKEAT/0417/11/RN, para 72).

138. In relation to the reasonableness of a proposed adjustment, this is a fact-sensitive question. It is an objective test: **Smith v Churchill Stairlifts plc** [2006] ICR 542.

Conclusions

Disability *Thyroid*

139. That the Claimant was disabled up to July 2020, by reason of her thyroid condition has been conceded. We also concluded that the Respondent knew or ought to have known that the Claimant was disabled, by reason of her thyroid condition, from March 2018, Mark Dowling having had information regarding the condition, how it impacted on the Claimant's energy levels and that her medical practitioner was recommending adjustments for the Claimant. Kim Thomas was also aware around the summer of 2018 of the Claimant's condition and by her own evidence had sought to make adjustments for the Claimant as a result.

Depression/anxiety/stress

140. We did not however conclude that the Claimant was disabled by reason of her depression, anxiety and or stress at the relevant times.

141. The Claimant gave evidence, and it was her case, that she has suffered these conditions continuously for a number of years. We did not accept that evidence. We had found that the Claimant had been diagnosed with depression which lasted around two months in June and July 2016, but that there was no evidence that the Claimant had, or had attended her GP for depression (or indeed anxiety or stress) at any other relevant time up to November 2021 despite regularly attending her GP practice. This was relevant for us whilst at the same time acknowledging that seeking medical support and diagnosis is not always necessary to establish disability.

142. The Claimant's medical evidence also indicated that her use of antidepressant medication was sporadic only until November 2021 and we found had, with any degree of certainty, only been taken by the Claimant in the latter part of 2018, at a period when she was under some scrutiny in work due to her job performance.

143. Indeed, the Claimant's own medical evidence is reflective of instances of reactive depression and anxiety/stress to life, in particular work-events, something that the Claimant herself had also referred to in her own impact statement when she referred to 'triggers' for her episodes.

144. We did not conclude that these intermittent reactions had become entrenched such that it could be said with any degree of likelihood that the Claimant was living with underlying mental impairments for the duration of the period from 2016. Rather, we concluded that the Claimant had short-lived episodes of adverse reactions to life events which did not amount to a mental impairment to satisfy the definition of disability.

145. In any event, even if that is wrong in terms of meeting the definition of 'long term', our focus was on the effects of any impairment, not the impairment itself, i.e. the question for the tribunal was whether the substantial adverse effect of any impairment had lasted or more was likely to last more than 12 months.

146. Whilst in the Claimant's impact statement she does speak of not communicating, not exercising, changing her clothes or getting washed being unable to both sleep or get out of bed, as a result of her conditions including depression, anxiety and stress - all day to day activities which, in the Tribunal's view were substantially and adversely impacted, she provided no evidence of how often this arose, or when such episodes started or ended.

147. Whilst we accept that this is how the instances of depression and anxiety/stress did impact on the Claimant's day to day activities when she was having an episode, we have been asked to accept that these impacts, on her day to day activities, was continuous from the first diagnosis in 2016 right up to November 2021.

148. We did not and concluded that the Claimant did not therefore satisfy the definition of disability at the relevant times by reason of depression anxiety and/or stress for the purposes of a disability discrimination claim.

149. Even if we are wrong in that conclusion, we further concluded that the Respondent did not have knowledge that the Claimant was disabled by reason of depression, anxiety and/or stress at any relevant time in any event as:

a. Save for the October 2018 self-certification [159], which recorded depression and preceded a period of work-related stress absence, this was at a time when Mark Dowling was indicating to the Claimant that her performance was under scrutiny and that her managers would be speaking to her about this. All other documented absences were for a variety of reasons such that it could not be said that the Respondent knew or ought to have know that the Claimant was disabled by reason of depression and/or anxiety and/or stress-related symptoms;

b. We accepted Kim Thomas' evidence that the Claimant had not told her of her depression, whether in October/November 2020 or indeed April/ May 2021 such that it could be said that the Respondent was on some kind of notice of disability or that they ought to have known.

Harassment (s.26 Equality Act 2010) or, in the alternative Direct Discrimination (s.13 Equality Act 2010)

150. With regard to these claims, it is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. If the Claimant does not prove such facts, the claim will fail commonly described as a 'prima facie case of discrimination'

151. We accept that it is unusual to find direct evidence of discrimination and that the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. At the second stage — which is only engaged if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) — the burden 'shifts' to the Respondent, which must prove (again on the balance of probabilities) a non-discriminatory reason for the treatment in question. Tribunals will only need to apply the provisions of S.136 if they are not in a position to make clear positive findings based on the evidence presented as to whether there has been discriminatory treatment and about the putative discriminator's motives for subjecting the claimant to that treatment (if relevant).

152. The Claimant's representative has spent some time in submissions focussed on the ATS allegation, raising what he has termed 'peculiarities' in the process adopted, in:

a. The amendment of that ATS sheet and the subsequent inclusion of Amanda White's initials;

b. The discrepancies in the Claimant's start time that day;

c. The lack of preservation of the CCTV footage;

d. Lack of clarity in the disciplinary allegation;

e. The lack of documentation regarding the ATS disciplinary retained by the Respondent.

153. We looked at these issues in terms of whether there were any facts from which we could infer discrimination such that the Claimant could establish a prima facie case of discrimination. We concluded that there were not.

154. Having accepted the evidence of the Respondent as to why the ATS sheet had been amended, namely to record the Claimant's start time for payroll purposes, the individual who could have provided the explanation, Amanda White, had not given evidence. This had not formed part of the Claimant's pleaded case however, nor was it clear from the Claimant's statement that this was a significant issue for the

Claimant prior to this hearing and we did not consider that this lack of explanation was sufficient to shift the burden in itself.

155. Whilst Kim Thomas' evidence did appear to change with regard to the lateness of the Claimant's arrival on her department, maintaining 5.15am in her evidence, whereas the letter inviting the Claimant to the disciplinary meeting alleged 5.06am, we were not satisfied that the discrepancies in the start time for the Claimant gave rise to any inference of discrimination as either way, the Respondent considered the Claimant to have arrived in the building at 5.02am and on that basis should not have recorded 5.00am on the ATS sheet.

156. We had not found that the Claimant's lateness was the disciplinary allegation. Rather, the allegation was that there was a discrepancy in the Claimant's clocking time and whilst we accepted that the Claimant was confused as to the allegation, and appears to still be confused as to the allegation, we did not accept that this was because of any lack of clarity in the allegation, namely falsifying records and that it was clear that she was accused of not entering the building until after 5.00am despite recording an ATS start time of 5.00am.

157. We had also accepted the Respondent's explanation of both the destruction of the CCTV and disciplinary records, specifically the ATS disciplinary as well as more generally, any earlier documents.

158. Whilst we did find that there were elements of the ATS disciplinary process that could and should have been handled better, in that Mr McGlone should have communicated in writing to the Claimant that the disciplinary investigation had ended and that there would be no further action, should have positively addressed whether she had any outstanding grievance and should have dealt with the subject access request, we did not conclude that his unreasonable conduct alone was insufficient for us to draw an inference from the Respondent's management of the ATS Disciplinary. Rather, we concluded that these were instances of general incompetence in managing the issues appropriately.

159. We would also repeat our findings more generally that Kim Thomas and the Claimant had a good professional relationship which was not supportive of any more general conclusion that Kim Thomas was part of a campaign of bullying, harassment or discrimination against the Claimant whether as a result of the protected characteristics relied on or at all.

160. Beyond the Claimant questioning what else could the reason be for the treatment if not her protected characteristics, we concluded that the Claimant had not at any time sought to link her protected characteristics of race, religion or age to the treatment relied on. Any

focus of the Claimant's presentation of the case was on the Claimant's health and in turn disability.

161. Dealing with the specific treatment relied on.

First disciplinary – January 2020

162. The Claimant was at this point disabled by reason of her thyroid condition.

163. Whilst we accepted that the Claimant had been invited to a disciplinary meeting on 27 January 2020, we did not conclude that the treatment was related to any of her protected characteristics.

164. Whilst it was arguable, that as the Claimant referred to her absences as being 'health related' her disability might have formed part of the ground or reason for the invite to the disciplinary, we had found that at least one of the absences, the third relating to flu, was not related to her thyroid disability. There was also suggestion that one absence may have been related to family emergency. Either way the Claimant did not know the reason for her absences.

165. Therefore we were not persuaded that the Claimant had demonstrated that the invite to the meeting in January 2020 was sufficiently connected to the her disability to satisfy the 'related to' aspect of the test of harassment.

166. Further, Nicky Jones had conducted this meeting and there was no suggestion by the Claimant that he had been part of any campaign as alleged. Whilst we accepted that being invited to any form of disciplinary meeting would be sufficient to meet the definition of 'unwanted conduct', we were not satisfied however that there was any evidence to indicate that the *purpose* of such an invite was to create the required statutory environment for the Claimant on any of the protected grounds relied on as we accepted that such invites were automatically triggered by payroll and not within supervisor or management discretion or subjective involvement from them.

167. Nor indeed did we conclude that the Claimant had proven the requisite statutory *effect* of such treatment - the Claimant provided no evidence of how being invited to this meeting impacted on her, no indication being evidenced in either the Claimant's witness statement or indeed reflected in the notes of the actual meeting [174]. Despite knowing how to complain, and having complained about her previous team leader in 2016, the Claimant did not in fact complain about this treatment, whether as part of her performance review or by way of separate complaint.

168. In any event, we do not consider that it was reasonable for the Claimant to have been so affected by such an invite in isolation, which was a meeting, albeit in accordance with the disciplinary

procedure, to discuss her absences taking into account that the Claimant had in fact been absent and in the context of the Respondent's disciplinary policy which provided for such a meeting.

169. Any claim of harassment on any of the protected characteristics therefore does not succeed and is dismissed.

170. In the alternative, in terms of direct discrimination, we were not persuaded that there was any evidence before us to demonstrate that other employees, with similar absences, would not have been or had not been invited to a similar type of disciplinary hearing.

171. Whilst the Claimant had named a number of comparators, no evidence was provided that they too had similar levels of sickness absence to the Claimant and/or had not been invited to such disciplinary meetings to discuss absences. We concluded that the named comparators were not appropriate comparators for this or indeed any of the Claimant's direct discrimination complaints.

172. Rather, we concluded that a hypothetical comparator would be another employee with similar levels of sickness absence and we concluded that they too would have had an invite to a disciplinary meeting to discuss their absences. In that regard the Claimant cannot demonstrate *less* favourable treatment.

173. In the circumstances the Claimant has shown no prima facie case of less favourable treatment and any claim of direct discrimination in relation to this meeting also does not succeed and is dismissed *October/November 2020 Disciplinary 2 and 3*

174. We deal with these together and conclude that we were not persuaded that the Claimant had been invited to either a disciplinary meeting to discuss lateness or to discuss performance on either date as:

a. Whilst the Respondent has no records of such an invite, the Claimant does not either and there is no explanation from the Claimant why she does not;

b. the Claimant had not in fact, from our review of the Respondent's attendance records, been late 3 times in any 30 day period from May 2019 – April 2021;

c. the Claimant makes no reference to such meetings in either her performance reviews or does she make any separate formal complaint.

175. Whilst we accept that the Claimant could have been mistaken on dates, on balance we concluded that the Claimant had not proven such meetings had taken place.

176. Any complaint however brought would therefore fail as the Claimant has not established the treatment relied on but in any event we would

repeat out conclusions that such treatment would not amount to a prima facie case of harassment or direct discrimination in the alternative in any event.

Kim and Kelly Campaign

177. For the reasons we have set out in our findings, we did not conclude that the treatment relied had arisen. Fundamentally we did not conclude that the Claimant had proven that any conduct or treatment that she was subjected to relied on as being related to or because of her protected characteristics.

178. We did not find that the Respondent threatened the Claimant with discipline and loss of job, was shouted at and in turn we do not conclude that the Claimant has demonstrated a prima face case of harassment, or in the alternative, direct discrimination in relation to the conduct of Kim Thomas and or Kelly Morris.

179. Whilst we accept that Kim Thomas, and indeed other supervisors and managers, had and would naturally have had routine performance discussions with the Claimant and that such conversations may indeed have been unwanted by the Claimant, we were not satisfied that the purpose or effect of these conversations was to have the requisite environment for the Claimant.

180. On the same basis we do not find that the Claimant was able to establish less favourable treatment – there was no evidence that the Respondent did not have routine conversations with other members of staff on their performance whether in terms of timekeeping, absence or capability.

11 November 2020 Disciplinary - ATS

181. We did not conclude that the Claimant had been invited to a disciplinary meeting to discuss a trivial and unfounded allegation. She was not asked to attend an investigation meeting, or subsequent disciplinary hearing to respond to an allegation that she had arrived 2 minutes late. Rather she was invited to a disciplinary meeting to respond to an allegation that she had falsified records.

182. We accepted the evidence of Kelly Miller that no other employee had arrived at work after 5am and that the Claimant was the only employee to have arrived in the building after the 5am start time. We have explained in our findings and earlier in these conclusions, how none of the concerns regarding the process that was adopted, including the lack of CCTV and documentation, give rise to an inference of discrimination.

183. We concluded that whilst the Claimant was subjected to the treatment of being invited to a disciplinary meeting, and was not doubt ‘unwanted conduct’ there was no basis on which we could find or infer that any of the Claimant’s protected characteristics formed part of the ground

or the reason for that treatment. Rather we accepted that the reason for the treatment was she had been observed on CCTV as arriving in the building after 5am and that there was a discrepancy between that and the Claimant's signing time. This was a reason unconnected to any of the Claimant's protected characteristics and on that basis both her claim of harassment and, in the alternative direct discrimination fail.

Failure to investigate or respond to the grievance/Failure to comply with the SAR

184. We deal with these two issues together as they both relate to the failings of James McGlone.

185. Whilst we concluded that James McGlone had failed to investigate the Claimant's wider concerns regarding previous instances of discrimination and failed to comply with the Claimant's subject access request, we concluded that he had not failed to respond to the main thrust of the Claimant's grievance, which was her discontent at being disciplined for the ATS issue.

186. However again we focused on the reason for his failings and concluded that this was because of James McGlone believing the grievance had resolved with him ending the disciplinary and because he had overlooked formal management of the subsequent subject access request under the GDPR again believing, albeit mistakenly, that he had already addressed this.

187. On that basis the Claimant has not persuaded that the reason for the treatment was related to or because of any of the Claimant's protected characteristics and these claims too fail. *Reasonable Adjustments*

188. In terms of reasonable adjustments claim, the Tribunal had concluded that the duty applied only in the period up to July 2020 and that we had concluded and accepted that the Respondent knew or could reasonably be expected to know that the Claimant had the disability of hyperthyroidism.

189. The Respondent had conceded that the PCPs relied on but disputed that these PCPs had placed the Claimant at a substantial disadvantage in that she had not demonstrated that they had in fact added extra pressure to the Claimant that she could not cope with. We agreed. We had no evidence from the Claimant to support this contention – whether in medical records or indeed within the notes of the meeting in January 2020.

190. On that basis the claim of failure to comply with the duty to make reasonable adjustments would fail.

191. In any event, we concluded that any claim for failure to make reasonable adjustments, in respect of that January 2020, was out of time and had not formed part of any continuing act. It was a meeting in January 2020, nearly two years prior to the ATS disciplinary and conducted by Nicky Jones.

192. We did not consider that it was just and equitable to extend time, in respect of this or indeed the discrimination complaints in relation to conduct in January 2020 or October 2020.

Employment Judge **Brace**
Date - 4 April 2023

REASONS SENT TO THE PARTIES ON 6 April 2023

FOR THE TRIBUNAL OFFICE Mr N Roche